Supreme Court, U.S.
FILED

981529 MAR 23 1999

OFFICE OF THE CLERK

No. 98-

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1998

HESTER INDUSTRIES, INC.,
*Petitioner*,

v.

TYSON FOODS, INC.,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## PETITION FOR WRIT OF CERTIORARI

ROBERT W. ADAMS
*Counsel of Record*
NIXON & VANDERHYE, PC
1100 North Glebe Road
8th Floor
Arlington, VA 22201
(703) 816-4000

*Attorneys for Petitioner*

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

132 pp

## QUESTION PRESENTED

1. Did the United States Court of Appeals for the Second Circuit abrogate this Court's language in *Kokkonen* v. *Guardian Life Insurance Co. of America* and erroneously ignore the decisions of other circuit courts holding that contempt of court arises from the violation of a settlement agreement where a dismissal order pursuant to Fed. R. Civ. P. 41(a)(1)(ii) incorporates the agreement into the order and/or retains jurisdiction over the agreement.

## PARTIES TO THE PROCEEDING

In addition to the two parties named in the caption, Hester Industries, Inc. merged with ConAgra Corporation on December 17, 1997.

## TABLE OF CONTENTS

**Page**

QUESTION PRESENTED ..... i

PARTIES TO THE PROCEEDING ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF CITATIONS ..... v

APPENDIX ..... vii

OPINIONS BELOW ..... 1

STATEMENT OF JURISDICTION ..... 1

STATEMENT OF THE CASE ..... 2

REASONS FOR GRANTING THE WRIT ..... 6

I. THE DECISION CONFLICTS WITH *KOKKONEN* AS WELL AS OTHER CIRCUIT COURT DECISIONS ..... 7

II. THE PARTIES AND JUDGE McAVOY INCORPORATED THE SETTLEMENT AGREEMENT INTO THE 1992 ORDER ..... 9

III. RULE 41 ORDERS ARE NOT INJUNCTIONS ..... 13

CONCLUSION ..... 17

## TABLE OF CITATIONS

**Cases Cited** **Page**

*Futernick v. Sumpter Township*, 78 F.3d 1051 (6th Cir. 1996) ..... 8

*Gardiner v. A.H. Robins Co.*, 747 F.2d 1180 (8th Cir. 1984) ..... 12

*Hester Indus., Inc. v. Tyson Foods, Inc.*, No. 93-CV-391, 1994 WL 774553 (N.D.N.Y. Aug. 8, 1994) ..... passim

*Hester Indus., Inc. v. Tyson Foods, Inc.*, 160 F.3d 911 (2d Cir. 1998) ..... passim

*Hester Indus., Inc. v. Tyson Foods, Inc.*, 985 F. Supp. 236 (N.D.N.Y. 1997) ..... 1

*Hester Indus., Inc. Tyson Foods, Inc., 985 F. Supp. 83 (N.D.N.Y 1997)* ..... 2

*International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64 (1967) ..... 13

*Interspiro USA Inc. v. Figgie Int'l Inc.*, 18 F.3d 927 (Fed. Cir. 1994) ..... 11, 12

*Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994) ..... passim

*Lee v. Runyan*, 18 F.Supp. 2d 649 (E.D. Tex. 1998) ..... 16

*Lucille v. City of Chicago*, 31 F.3d 546 (7th Cir. 1994) ... 16

*In re Peck*, 155 B.R. 301 (D. Conn. 1993) ..... 14

*In re Wolf*, 842 F.2d 464 (D.C. Cir. 1988) ..... 12

**Other Authorities** **Page**

Fed. R. Civ. P. 41 ..... passim

Fed. R. Civ. P. 41(a)(1)(ii) ..... passim

Fed. R. Civ. P. 41(a)(2) ..... 2

Fed. R. Civ. P. 65 ..... passim

17 Am. Jur. 2d *Contempt* §156 (1990) ..... 15

## APPENDIX

Appendix A - Opinion of the United States Court of Appeals for the Second Circuit, reported at *Hester Industries, Inc. v. Tyson Foods, Inc.*, 160 F.3d 911 (2d Cir. 1998) . . . . . 1a

Appendix B - Decision of United States District Court for the Northern District of New York, reported at *Hester Industries, Inc. v. Tyson Foods, Inc.*, No. 93-CV-391, 1994 WL 774563 (N.D.N.Y. Aug. 8, 1994) . . . . . 14a

Appendix C - Decision of United States District Court for the Northern District of New York, reported at *Hester Industries, Inc. v. Tyson Foods, Inc.*, No. 94-CV-391, 1995 WL 113939 (N.D.N.Y. Jan. 30, 1995) . . . . . 24a

Appendix D - Decision of United States District Court for the Northern District of New York, dated July 29, 1997 and reported at *Hester Industries, Inc. v. Tyson Foods, Inc.*, 985 F. Supp. 236 (N.D.N.Y. 1997) . . . . . 36a

Appendix E - Decision of United States District Court for the Northern District of New York, dated November 17, 1997 and reported at *Hester Industries, Inc. v. Tyson Foods, Inc.*, 985 F. Supp. 83 (N.D.N.Y. 1997) . . . . . 64a

Appendix F - Stipulated Order of Dismissal entered by United States District Court for the Northern District of New York on April 9, 1992 with attached Settlement Agreement ..... 70a

Appendix G - Denial, filed December 23, 1998, by the United States Court of Appeals for the Second Circuit of Hester Industries, Inc.'s Petition for Rehearing *In Banc* ..... 76a

Appendix H - Letter from Tyson's counsel, Richard G. Lione, to Hester's counsel, Robert W. Adams, dated March 19, 1993 ..... 78a

Appendix I - Answer of Tyson Foods, Inc. ..... 80a

Appendix J - Complaint of Hester Industries, Inc. for Breach of Contract, Violation of Stipulated Order of Dismissal, Trademark Dilution, Trademark Infringement, and Unfair Competition ..... 93a

Appendix K - Letter from Frederick C. Riester to Clerk, United States District Court for the Northern District of New York, dated April 3, 1992 ..... 106a

Petitioner, Hester Industries, Inc. ("Hester"), respectfully requests issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit vacating a holding by the United States District Court for the Northern District of New York that Tyson Foods, Inc. ("Tyson") was in contempt of court for violating the terms of a settlement agreement that were incorporated into a Rule 41 dismissal order.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *Hester Industries, Inc. v. Tyson Foods, Inc.*, 160 F.3d 911 (2d Cir. 1998). (App. A).

The decisions of the district court at issue in this Petition are: (1) a decision dated August 8, 1994 granting Hester's motion for partial summary judgment for contempt, 1994 WL 774553, (App. B); (2) a decision dated January 30, 1995 granting Hester's second motion for partial summary judgment for contempt, 1995 WL 113939, (App. C); (3) a contempt decision dated July 29, 1997 that is reported at *Hester Industries, Inc. v. Tyson Foods, Inc.*, 985 F. Supp. 236 (N.D.N.Y. 1997), (App. D); and (4) a decision dated November 17, 1997 denying Tyson's motion to amend or alter the contempt judgment that is reported at *Hester Industries, Inc. v. Tyson Foods, Inc.*, 985 F. Supp. 83 (N.D.N.Y. 1997), (App. E).

## STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit ("Second Circuit") was entered on November 20, 1998. A timely petition for rehearing and

suggestion for rehearing *in banc* was filed on December 4, 1998. This petition was denied on December 23, 1998.

## STATEMENT OF THE CASE

In August 1989, Hester commenced a trademark dilution action against Tyson alleging, *inter alia*, that Tyson's use of the WING FLINGS trademark diluted Hester's WING-DINGS trademark in violation of the laws of New York and other states.

Just before trial in 1992, the parties entered into a settlement agreement ("the Agreement"). The parties further agreed that the Agreement would be attached to a Stipulated Order of Dismissal ("the 1992 Order") pursuant to Rule 41, Fed. R. Civ. P., and that this combined document would be submitted to the district court for review and, if approved, signed and entered by the court. On April 9, 1992, after its review and approval by the district court, the 1992 Order was entered and "SO ORDERED." (App. F).[1]

The 1992 Order specifically states that it was entered "[p]ursuant to Rule 41 of the Federal Rules of Civil Procedure and in accordance with the terms of the attached Settlement Agreement between the parties." The Agreement required Tyson to discontinue all use of the WING FLINGS mark after a limited phase-out period.

In the Agreement, the parties also provided that the lawsuit would be dismissed by stipulation. Paragraph 6 of

---

[1] Although Hester argued below and the district court judge (Chief Judge McAvoy) held that the 1992 Order was entered pursuant to Rule 41(a)(2), the Second Circuit concluded that the 1992 Order was entered pursuant to Rule 41(a)(1)(ii).

the Agreement states, in pertinent part, as follows:

> Hester will promptly dismiss with prejudice by stipulation of the parties without the entry of any judgment, injunction or order for injunction [the pending action]. However, such dismissal will be dependent upon the terms of this Agreement being subjected to enforcement by specific performance by the United States District Court for the Northern District of New York. As a result, a copy of this Settlement Agreement will be filed with the Court along with the dismissal papers.

(App. F).

In accordance with the foregoing, the parties forwarded to the district court the fully executed Agreement as an attachment to the 1992 Order, which was reviewed, approved, signed and "SO ORDERED" by the district court.

By submitting an Order pursuant to Rule 41, the parties followed the provisions and intent of paragraph 6 of the Agreement. Specifically, the Rule 41 Order did not enter judgment against any party, as would be the case with an order entered as a consent judgment. Likewise, the Rule 41 Order was not an injunction or an order for injunctive relief, because it was not an order entered under Rule 65, Fed. R. Civ. P.

Nonetheless, the 1992 Order pursuant to Rule 41 was not a meaningless legal gesture. As this Court stated in *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375, 381 (1994), the district court's jurisdiction and contempt power exist if either the settlement agreement is

incorporated in the order dismissing the action or the court retains jurisdiction over the agreement. As is relevant here, jurisdiction and contempt power exist even if the order is entered under Rule 41(a)(1)(ii). *See id.* at 381-82.

In March 1993, Hester learned that Tyson was violating the terms of the Agreement. As a result, Hester sent a letter to Tyson's counsel requesting that Tyson cease the violations and provide an accounting. In a response letter dated March 19, 1993, Tyson's counsel denied any wrongdoing and added that Tyson would not provide an accounting because it "has better things to do with its time." (App. H).

On March 25, 1993, Hester commenced the present action alleging a number of causes of action, including an assertion that Tyson was in contempt of court for violating the 1992 Order. On June 17, 1994, Hester moved for partial summary judgment with respect to its breach of contract and contempt causes of action. In a ruling on August 8, 1994, the district court granted partial summary judgment for Hester with respect to Tyson's improper use of WING FLINGS on packaging and invoices. *See Hester Indus., Inc. v. Tyson Foods, Inc.*, No. 93-CV-391, 1994 WL 774553, at **4-5 (N.D.N.Y. Aug. 8, 1994). (App. B).

Significantly, Chief Judge McAvoy (the same judge who had handled the prior dilution action and issued the 1992 Order) found that the 1992 Order "incorporated" the terms of the Agreement. Therefore, he held that the violation of the Agreement also served as a basis for finding Tyson in contempt of court. *See id.* at **3-5. In particular, Chief Judge McAvoy stated that "the wording of the [1992] order logically leads one to find that the terms of the settlement

agreement were conditions approved by the Court through the dismissal order and, thus, were incorporated into the order." *Id.* at *3.

Hester has alleged throughout this litigation (from the filing of the complaint to date) that the Agreement was "incorporated" into the 1992 Order by attachment and reference. Thus, both the district judge and Hester have evidenced a clear and unequivocal intention that the Agreement be incorporated into the 1992 Order.

Likewise, Tyson's original Answer unequivocally admitted that the Agreement was "incorporated" into that 1992 Order. See paragraph 27 of that Answer, wherein Tyson stated that "[t]he allegations of Paragraph 27 of the Complaint are admitted." (Apps. I, J). This admission demonstrates that Tyson agreed that the settlement agreement was intentionally incorporated in the 1992 Order.[2]

After trial in 1997, the district court entered judgment against Tyson and awarded Hester $8.6 million based upon the contempt cause of action. The court reserved decision with respect to the other causes of action.

On appeal, the Second Circuit vacated this award and held that to construe the 1992 Order "as a court order prohibiting continued use of the WING FLINGS mark would require that we equate the dismissal order with an order requiring entry of an injunction." *Hester Indus.*, 160 F.3d at

---

[2] Approximately one year later, Tyson amended that response in its Amended Answer. Obviously, Tyson belatedly realized the legal consequences of its unequivocal admission and tried to withdraw the admission. Nevertheless, Tyson's original Answer still constitutes a binding admission.

916. In doing so, the Second Circuit attempted to distinguish *Kokkonen*. *See id.* at 917 n.2. The Second Circuit recognized that *Kokkonen* authorizes a district court, with the consent of the parties, to retain jurisdiction to enforce a settlement agreement that serves as a basis for the stipulated dismissal pursuant to Rule 41(a)(1)(ii). *See id.* However, the Second Circuit distinguished *Kokkonen* by asserting that paragraph 6 of the agreement does "not clearly communicate an intention of the parties and of the district court that the parties' settlement agreement be incorporated into the order." *Id.*

In making this purported distinction, the Second Circuit ignored the following undisputed facts. First, the record on summary judgment shows that Hester intended that the agreement be incorporated into the 1992 Order. Second, the record on summary judgment shows that Tyson admitted in its original Answer that the Agreement was incorporated into the 1992 Order. Third, the district judge's opinion of August 8, 1994 unequivocally demonstrates that he intended to incorporate the agreement into the 1992 Order.

## REASONS FOR GRANTING THE WRIT

The primary reason for granting the writ relates to the fundamental need of the judicial system to manage effectively and end litigation through the use of Rule 41 orders that incorporate settlement agreements. Put in other words, litigants who forego the continuation of a lawsuit in return for the receipt of settlement obligations incorporated into a Rule 41 (a)(1)(ii) order should be able to expect and rely upon a fairly literal interpretation of the bargain that was negotiated by the parties and entered by court order.

Hester respectfully submits that the Second Circuit decision is contrary to the express directions set forth in the unanimous Supreme Court decision in *Kokkonen* concerning the contempt enforcement of court orders. The Second Circuit decision also is contrary to other appellate decisions from, *inter alia*, the Sixth, Seventh and Federal Circuits that clearly state that contempt will arise from the violation of an order incorporating settlement agreements or retaining jurisdiction over those agreements.

## I. THE DECISION CONFLICTS WITH *KOKKONEN* AS WELL AS OTHER CIRCUIT COURT DECISIONS

In this case, the parties specifically incorporated their settlement agreement into the 1992 Order by both referring to the agreement in the Order and by attaching the settlement agreement to that Order. Under these circumstances, Hester respectfully submits that the Second Circuit improperly found that the unanimous pronouncements of this Court in *Kokkonen* were inapplicable to this case.

*Kokkonen* involved a Rule 41(a)(1)(ii) dismissal order that neither referred to nor incorporated the settlement agreement. Respondent argued that district court jurisdiction existed based upon the "inherent power" of the court "to enable a court to function successfully, that is to manage its proceedings, vindicate its authority, and effectuate its decrees." *Kokkonen*, 511 U.S. at 380. This Court held that, under the facts of that case, the district court had no ancillary jurisdiction (e.g., by way of contempt power) to retain jurisdiction, because the order at issue neither referred to nor incorporated the settlement agreement. *See id.* at 379-82.

However, as is relevant here, this Court unanimously stated in *Kokkonen* that the district court's jurisdiction and contempt power would exist if either the settlement agreement was incorporated in the order or the court retained jurisdiction over the agreement. *See id.* at 381. Specifically, this Court stated:

> But the only order here was that the suit be dismissed, a disposition that is in no way flouted or imperiled by the alleged breach of the settlement agreement. The situation would be quite different if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal – either by separate provision (such as a provision "retaining jurisdiction" over the settlement agreement) or by incorporating the terms of the settlement agreement in the order. In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist.

*Id.* at 380-81 (emphasis added).

In other words, "a breach of the agreement would be a violation of the [Rule 41] order," so long as either the settlement agreement is incorporated into the Rule 41 order or the court retains jurisdiction over the settlement agreement.[3]

---

[3] *See also Futernick v. Sumpter Township*, 78 F.3d 1051, 1055 n.4 (6th Cir. 1996) (citing *Kokkonen* and holding that plaintiff "may not be able to seek contempt sanctions against the Township immediately, as he would have been able to had the district court retained jurisdiction or incorporated the settlement agreement into the order of dismissal").

It must be emphasized that the unanimous Supreme Court decision in *Kokkonen* also explicitly discussed a Rule 41(a)(1)(ii) order. In that regard, this Court directed that:

> Even when, as occurred here, the dismissal is pursuant to Rule 41(a)(1)(ii) (which does not by its terms empower a district court to attach conditions to the parties' stipulation of dismissal) we think that the court is authorized to embody the settlement contract in its dismissal order (or, what has the same effect, retain jurisdiction over the settlement contract) if the parties agree.

*Id.* at 381-82.

## II. THE PARTIES AND JUDGE McAVOY INCORPORATED THE SETTLEMENT AGREEMENT INTO THE 1992 ORDER

The Second Circuit dismissed this Court's direction by claiming that *Kokkonen* was not applicable to the present lawsuit. As noted above, the Second Circuit stated that "the text of the dismissal order at issue here ... did not clearly communicate an intention of the parties and of the district court that the parties' settlement agreement be incorporated into the order." *Hester Indus.*, 160 F.3d at 917 n.2.

However, in making this comment, the Second Circuit ignored the admitted intentions of the parties and the holding of Chief Judge McAvoy that the Agreement be "incorporated." In order to determine the intention of the parties and the district court with respect to the issue of "incorporation," it is necessary to review what the parties agreed to and the actions they took in accordance with their

agreement.

The starting point of such an analysis is the third sentence of paragraph 6 of the settlement agreement, which explicitly requires that "a copy of this Settlement Agreement will be filed with the Court along with the dismissal papers." (App. F). The parties' jointly effectuated this portion of the settlement agreement in a very clear and intentional manner by drafting a dismissal order that both refers to and attaches the settlement agreement to the 1992 Order. Indeed, the 1992 Order states, in part, that it is "in accordance with the terms of the attached Settlement Agreement." (App. F).

Moreover, the Second Circuit opinion fails to provide any critical analysis of the parties' or Chief Judge McAvoy's intentions with respect to "incorporation" of the Agreement into the 1992 Order. The record, however, establishes the parties' and the district court judge's clear intention to incorporate the terms of the Agreement into the 1992 Order.

First, plaintiff Hester admitted throughout the action that the settlement agreement was "incorporated" into the 1992 Order. For example, paragraph 27 of the original Complaint expressly states that the settlement agreement was "incorporated" into the 1992 Order. (App. J). The intent of Hester to incorporate the settlement agreement into the 1992 Order is further demonstrated by (1) the third sentence of paragraph 6 of the settlement agreement, which requires the filing of the settlement agreement with the 1992 Order and (2) the parties' preparation and execution of the 1992 Order, which expressly refers to and attaches that settlement agreement. (App. F).

Second, defendant Tyson's original Answer

unequivocally admits that the agreement was "incorporated" into that 1992 Order. See paragraph 27 wherein Tyson stated that "[t]he allegations of Paragraph 27 of the Complaint are admitted." (Apps. I, J). This admission demonstrates that Tyson agreed that the settlement agreement was intentionally incorporated into the 1992 Order.

Third, Chief Judge McAvoy (the judge who originally reviewed, approved, signed, "SO ORDERED" and entered the 1992 Order) held that the settlement agreement was incorporated into his 1992 Order. *See Hester Indus.*, 1994 WL 774553, at **3-5. Indeed, Chief Judge McAvoy entered the 1992 Order only after his review and approval of the entire document, including the attached settlement agreement. Again, it is noteworthy that the parties jointly submitted the 1992 Order and attached settlement agreement to Chief Judge McAvoy with the request that, "[i]f the Court approves same, please enter the Order in your office." (App. K). Because Chief Judge McAvoy was an active participant in the entry of the 1992 Order, his holding that the Agreement was incorporated in that Order is dispositive of his intention.

Fourth, the relevant legal authorities support the "incorporation" holding of Chief Judge McAvoy. A court order is not required to use "incorporate" or any other "magic words" to accomplish its purpose. As stated in *Interspiro USA Inc. v. Figgie International Inc.*, 18 F.3d 927, 930 (Fed. Cir. 1994):

> [The defendant] squarely disregards settled law that a court is not required to use explicit language or "any magic form of words" to effect a valid incorporation

of an agreement into an order.

Significantly, the dismissal order in *Interspiro* read:

> The parties hereto have entered into an agreement settling the issues before [the court], and by and through their attorneys, and *pursuant to that agreement* hereby stipulate that the complaint and counterclaim ... be dismissed with prejudice ... .

*Id.* (underscoring added).

The language in *Interspiro* ("pursuant to that agreement") closely mirrors the language in the subject 1992 Order ("in accordance with the terms of the attached settlement agreement"). Thus, Chief Judge McAvoy's holding that the Settlement Agreement was incorporated into the 1992 Order was correct.

Furthermore, the Second Circuit's reliance upon *Gardiner v. A.H. Robins Co.*, 747 F.2d 1180 (8th Cir. 1984), and *In re Wolf*, 842 F.2d 464 (D.C. Cir. 1988), is misplaced, because the district courts in those cases acted contrary to the parties' intentions either by "so ordering" a dismissal order when not requested to do so, *see Gardiner*, 747 F.2d at 1190, or by altering the stipulation and entering a dismissal order contrary to the agreement of the parties. *See In re Wolf*, 842 F.2d at 466. Nothing remotely similar to those facts occurred here.

In this case, the 1992 Order was entered "[p]ursuant to Rule 41 of the Federal Rules of Civil Procedure and in

accordance with the terms of the attached Settlement Agreement between the parties." This language (i.e., the specific reference to and attachment of the Agreement) serves to incorporate the Agreement into the Order.[4]

## III. RULE 41 ORDERS ARE NOT INJUNCTIONS

Looking at the Second Circuit's opinion from another standpoint, the opinion states that "[t]o construe the 'Stipulated Order of Dismissal' as a court order prohibiting continued use of the WING FLINGS mark would require that we equate the dismissal order with an order requiring entry of an injunction." *Hester Indus.*, 160 F.3d at 916 (citing *International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 75 (1967)).

This citation to *International Longshoremen's* is flawed, because this Court's decision in that case did not involve a Rule 41 order incorporating a settlement agreement. Instead, *International Longshoremen's* involved a contested union proceeding under a labor statute, wherein the court entered an order based on an arbitrator's award that, although not held to be an injunction, was found not to comply with Rule 65. In short, the facts of *International Longshoreman's* have no application to this case or any other Rule 41(a) order.

---

[4] Put in different terms, if all the parties wished to do was to dismiss the action without incorporation, then they would have agreed not to file the agreement with the court; they would have filed a Rule 41(a)(1)(ii) stipulation without any reference to that agreement, and they would not have submitted the 1992 with the attached agreement for Chief Judge McAvoy's review, approval and entry.

Moreover, it is important to bear in mind that Rule 41(a)(1)(ii) orders are the result of a joint effort by all of the parties to resolve litigation. In the case of a Rule 41 order, the parties jointly draft the terms of the order, and, as a result, they fully understand its meaning and obligations.

Thus, Rule 41 is an important judicial vehicle by which the parties and the court can resolve a lawsuit by stipulation and pursuant to the terms of their settlement agreements. Many times (and this case is an example), one or more of the parties does not want judgment entered under Rule 54 or by way of a consent judgment. Significantly, Rule 41 allows the parties to settle an action without the entry of judgment. Here, both Hester and Tyson opted for a Rule 41 resolution (with the attachment and incorporation of the Agreement), as opposed to the termination of the action pursuant to the entry of a consent judgment.

Further, a Rule 41 order is not a Rule 65 order. A Rule 65 order is drafted by one party seeking an injunction and without the cooperation or consent of the other party who would be subject to that Rule 65 order. Consequently, Rule 65 contains many safeguards to protect the "other party" being enjoined. However, these safeguards are unnecessary where the Rule 41 order and settlement agreement are the result of the joint drafting work of both parties.

For this reason, Rule 41 rightly makes no mention of the need for the dismissal order to be in the form of an injunction under Rule 65. Thus, orders under Rule 41 are neither injunctions nor orders for injunctive relief. For a scholarly discussion directly on this issue, see *In re Peck*, 155 B.R. 301, 306-07 (D. Conn. 1993) (Rule 65 not at issue

in settlement agreement that was submitted per Rule 41). See also the decisions cited by Chief Judge McAvoy in support of his grant of partial summary judgment. *Hester Indus.*, 1994 WL 774553, at **2-3.

Moreover, the unanimous decision of this Court in *Kokkonen* makes clear that a Rule 41 order need not be in the form of an injunction, because, for example, the retention of jurisdiction or the incorporation of a settlement agreement will give rise to contempt sanctions if the terms of a settlement agreement are violated.[5] *See Kokkonen*, 511 U.S. at 381.

Thus, the agreement of the parties in this case that there would be no entry of either a judgment or an injunction does not preclude the enforcement of a Rule 41 order under *Kokkonen*. Here, the wording of the Agreement evidences a clear intention that the parties wanted the case settled by an enforceable Rule 41 Order (see the second and third sentences of paragraph 6 of that Agreement), but without the entry of judgment or injunctive relief. (App. F).

In accordance with *Kokkonen*, the incorporation of the Agreement into a Rule 41 (a)(1)(ii) order supports a holding of contempt in the event the terms of the agreement are violated. *See id.* Indeed, the Seventh Circuit recently indicated (after citing *Kokkonen*) that violation of a court order incorporating a settlement or retaining jurisdiction to

---

[5] Every court order, whether it is an injunction or not, is subject to a finding of contempt if a party does not abide by its terms. *See, e.g.*, 17 Am. Jur. 2d *Contempt* §156 (1990) ("The rule that an order of the court having jurisdiction over the parties and the subject matter ... may not be disregarded without incurring punishment for contempt of court, applies to oral orders, commands, and directions of the court....").

enforce the settlement would constitute contempt ("flout the court's order"). *See Lucille v. City of Chicago*, 31 F.3d 546, 548 (7th Cir. 1994). Although it held that no contempt arose in that specific case because the district court's consent decree did not incorporate the settlement or reserve power to the court to enforce the agreement, the court stated:

> [T]he court also possesses jurisdiction if the judgment implicitly incorporates the terms of a settlement that itself provides for continuing jurisdiction. .... But the district court's judgment in this case does not incorporate the settlement or reserve power to enforce the parties' agreement.

*Id.* (citation omitted) (emphasis added). The fact that a settlement agreement may be "implicitly incorporated" (i.e., incorporated by reference or attachment) shows that compliance with Rule 65 is not required with respect to a Rule 41 order of dismissal.[6]

Finally, and alternatively, *Kokkonen* indicates that the existence of a provision "'retaining jurisdiction' over the settlement agreement" would be sufficient to give rise to a contempt violation if the terms of the settlement agreement were violated. *Kokkonen*, 511 U.S. at 381. Here, the second sentence of paragraph 6 of the settlement agreement expressly provides that the court maintained jurisdiction over

---

[6] *See also Lee v. Runyan*, 18 F.Supp. 2d 649, 653 (E.D.Tex. 1998) (where the record showed that the court reviewed the settlement agreement, and where the dismissal order specifically mentioned that agreement, the court had jurisdiction over any enforcement action, because the agreement -- but not the dismissal order -- expressly provided for this jurisdiction).

the enforcement of the settlement agreement. (App. F). Thus, Hester and Tyson expressly made the retention of the district court's jurisdiction over the settlement agreement an integral part of the 1992 Order by attaching that settlement agreement to the Order.[7]

Unfortunately, the Second Circuit opinion contains no discussion of this aspect of *Kokkonen*. Hester submits that the parties' explicit agreement for the district court's retention of jurisdiction is sufficient under the guidelines set forth in *Kokkonen* to affirm the decision of Chief Judge McAvoy below.

## CONCLUSION

In view of the foregoing, Hester respectfully requests that its petition for writ of certiorari be granted.

Respectfully submitted,

Robert W. Adams
Counsel of Record
NIXON & VANDERHYE P.C.
1100 N. Glebe Road, 8th Flr.
Arlington, Virginia 22201
(703) 816-4000

---

[7] Again, the direction in *Kokkonen* that the mere retention of jurisdiction will support a finding of contempt is directly contrary to the argument that a Rule 41 Order is equivalent to an injunction and that, therefore, it must comply with the terms of Rule 65.